

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

(1) ZHN, LLC,

Plaintiff,

v.

Case No. CIV-12-1289-M

(1) RANDY MILLER, LLC,
(2) RANDY L. MILLER,
(3) LIPPARD AUCTIONEERS, INC.,
(4) TROY LIPPARD,
(5) ANGIE LIPPARD;
(6) BRADY LIPPARD,
(7) JERRY WHITNEY, and
(8) UNITED COUNTRY REAL ESTATE,
INC. d/b/a UNITED COUNTRY
AUCTION SERVICES AND UNITED
COUNTRY REAL ESTATE
SERVICES,

Defendants.

(1) RANDY MILLER, LLC,
(2) RANDY L. MILLER, and
(3) LIPPARD AUCTIONEERS, INC.,

Third Party Plaintiffs,

v.

(1) ALEXANDER MAGID
a/k/a ALEX MAGID,

Third Party Defendant.

**ZHN, LLC'S REPLY TO LIPPARD AND UNITED COUNTRY
DEFENDANTS MOTION TO STRIKE PORTIONS
OF THE EXPERT TESTIMONY OF MIKE BRANDLY [Doc. 332]**

Defendants concur that an opinion on "ultimate issues of law is not for an expert, but for the court", as the Plaintiff ZHN has demonstrated in its Motion to Strike Portions

of the Expert Testimony of Mike Brandly [Doc. 257]. Mr. Brandly expresses his interpretations of the Uniform Commercial Code Section 2-328 at pages 40, 42, 54, 68 and 233 of his deposition testimony, which are set out in ZHN's Motion to Strike. Mr. Brandly also discusses and interprets the Law of Oklahoma as it applies to limited liability companies, and in particular the legality of a seller using a sham LLC to bid on its behalf, to circumvent the prohibition of the seller bidding in an absolute auction. Both express legal opinions, are ultimate issues of law in the case, and are dispositive of key issues. In *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988), a lawyer was permitted by the District Court to testify in a civil rights action regarding consent in illegal searches. The Tenth Circuit reversed, holding that, by allowing such testimony, the trial court permitted the expert to supplant both the court's duty to set forth the law and the jury's ability to apply the law to the evidence, stating (at p. 807):

It is axiomatic that the judge is the sole arbiter of the law and its applicability. 'A witness cannot be allowed to give an opinion on a question of law . . . In order to justify having courts resolve disputes between litigants it must be positive as an *a priori* assumption that there is one, but only one answer to every cognizable dispute. There being only one applicable legal rule for each dispute or issue it requires only one spokesman of the law, who of course is the Judge . . . To allow anyone else other than the Judge to state the law would violate the basic concept'.

(Citation omitted)

Allowing Mr. Brandly to testify to his interpretation of provisions of the Uniform Commercial Code and also his legal analysis of why it is permissible for a seller to bid through a sham LLC where the seller is prohibited from bidding would be a direct violation of premise set forth above.

Accordingly, Mr. Brandly's testimony should be limited, in that, he should not be permitted to offer any legal interpretations, conclusions or opinions regarding matters in this case.

Respectfully submitted,

/s/ Murray E. Abowitz

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2015, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic filing to the following ECF registrants:

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